Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

Vol. 10 FEBRUARY 25, 1976 No. 8

This issue contains

DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 85 cents (single copy). Subscription price: $43.70 a year; $10.95 additional for foreign mailing.

U.S. Customs Service

(T.D. 76-44)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds) Customs Form 7605

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 9, 1976.

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at end of list.

Name of principal and surety	Date term commences	Date of approval	Filed with area director of Customs; amount
British Airways Board, Inc. 245 Park Ave., New York, NY; Federal Ins. Co. (PB 6/29/61) D 1/23/76 [1]	Jan. 23, 1976	Jan. 26, 1976	N.Y. Seaport; $100,000

[1] Principal is British Overseas Airways Corp.

The foregoing has been designated as a carrier of bonded merchandise.

(BON-3-01)

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(T.D. 76–45)

Fish—Tariff Rate Quota

The tariff-rate quota for the calendar year 1976, on certain fish dutiable under Item 110.50, Tariff Schedules of the United States

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 9, 1976.

In accordance with item 110.50 of part 3, schedule 1, Tariff Schedules of the United States, it has been ascertained that the average aggregate apparent annual consumption in the United States of fish, fresh, chilled or frozen, fillets, steaks, and sticks, of cod, cusk, haddock, hake, pollock, and rosefish, in the three years preceding 1976, calculated in the manner provided for in headnote 1, part 3A, schedule 1, was 240,993,150 pounds. The quantity of fish that may be imported for consumption during the calendar year 1976 at the reduced rate of duty under item 110.50 is, therefore, 36,148,973 pounds.

(QUO–2)

G. R. DICKERSON,
Acting Commissioner of Customs.

[Published in the FEDERAL REGISTER February 17, 1976 (41 FR 7157)]

(T.D. 76–46)

Bonds

Approval and discontinuance of carrier bonds, Customs Form 3587

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 10, 1976.

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the

surety was different, the information is shown in a footnote at the end of list.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director; amount
ABC-Trans National Transport, Inc., 201 11th Ave., New York, NY; freight forwarder, Sentry Ins.-A Mutual Co.	Dec. 18, 1975	Jan. 12, 1976	Chicago, IL; $50,000
Acme Fast Freight, Inc., 156 William St., New York, NY; motor carrier, Aetna Ins. Co. D 2/1/76	July 25, 1974	July 25, 1974	St. Louis, MO; $25,000
Admiral Merchants Motor Freight, Inc., 2625 Territorial Road, St. Paul, MN; motor carrier, Protective Ins. Co. (PB 9/19/63) D 12/31/75 [1]	Dec. 31, 1975	Dec. 31, 1975	Minneapolis, MN; $30,000
All-American, Inc., 900 West Delaware St., Sioux Falls, SD; motor carrier, Western Surety Co. D 12/29/75	Aug. 4, 1975	Sept. 5, 1975	Chicago, IL; $30,000
Big Mac Trucking Co., 1335 Boyles, Houston, TX; motor carrier, St. Paul Fire & Marine Ins. Co.	Jan. 6, 1976	Jan. 7, 1976	Houston, TX; $25,000
John F. Bruce, an individual, 1311 16th St., South, Great Falls, MT; motor carrier, St. Paul Fire & Marine Ins. Co. D 1/30/76	Jan. 17, 1972	Jan. 18, 1972	Great Falls, MT; $25,000
Channel Trucking & Services, Inc., 8850 North Loop East, Houston, TX; motor carrier, St. Paul Fire & Marine Ins. Co.	Dec. 31, 1975	Jan. 5, 1976	Houston, TX; $25,000
Dallas Carriers Corp., P.O. Box 7024, Dallas, TX; motor carrier, Transamerica Ins., Co. (PB 11/6/73) D 1/20/76 [2]	Nov. 6, 1975	Jan. 20, 1976	Houston, TX; $25,000
The Darcy Transportation Co., Inc., 332 Chase River Rd, Waterbury, CT; motor carrier, St. Paul Fire & Marine Ins. Co. (PB 9/20/63) D 10/15/74 [3]	Oct. 2, 1974	Oct. 15, 1974	Bridgeport, CT; $25,000
Diamond State Truck Brokers, Inc., P.O. Box 238, Milford, DE; motor carrier, Ins. Co. of North America	Nov. 11, 1975	Dec. 29, 1975	Philadelphia, PA; $50,000
Dundee Truck Line, Inc., 6006 Stickney Ave., P.O. Box 566, Toledo, OH; motor carrier, Agricultural Ins. Co. D 1/20/76	May 31, 1972	June 14, 1972	Cleveland, OH; $35,000
Eagle Truck Transport, Inc., 2704 E. Butler St., Philadelphia, PA; motor carrier, Fidelity & Deposit Co. of MD.	Dec. 24, 1975	Jan. 15, 1976	Philadelphia, PA; $50,000
Guignard Freight Lines, Inc., Highway 21N, P.O. Box 26067, Charlotte, NC; motor carrier, Maryland Casualty Co.	Nov. 11, 1975	Jan. 6, 1976	Wilmington, NC; $50,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director; amount
Haefele Transportation Co., Inc., 4325 Bath St., Philadelphia, PA; motor carrier, Nationwide Mutual Ins. Co. D 1/8/76	June 26, 1975	Aug. 18, 1975	Philadelphia, PA; $50,000
Kale Equipment Rental, Inc., Milnor & Bleigh Streets, Philadelphia, PA; motor carrier, Commercial Union Ins. Co. D 1/8/76	Sept. 15, 1973	Jan. 25, 1974	Philadelphia, PA; $50,000
Maislin Transport of Delaware, Inc., 530 Totem Road, Bensalem Township, Bucks County, PA; motor carrier, Globe Indemnity Co.	Jan. 9, 1976	Jan. 26, 1976	Philadelphia, PA; $50,000
Modern Motor Express, Inc., 6006 Stickney Ave., P.O. Box 566, Toledo, OH; motor carrier, Agricultural Ins. Co. D 1/20/76	May 31, 1972	June 14, 1972	Cleveland, OH; $35,000
National Carloading Corp., 201 11th Ave., New York, NY; freight forwarder, Sentry Ins. D 1/12/76	Oct. 29, 1974	Nov. 14, 1974	Chicago, IL; $50,000
John W. Newton, Jr., Customs Broker & Freight Forwarder, 470 Orleans St., Suite 601, Beaumont Savings Bldg., Beaumont, TX; motor carrier, St. Paul Fire & Marine Ins. Co.	Jan. 13, 1976	Jan. 19, 1976	Port Arthur, TX; $25,000
Pacific & Arctic Railway & Navigation Co., & Pacific & Arctic Pipelines Inc., 1314 Vance Bldg., Seattle, WA; rail and pipeline carrier, U.S. Fidelity & Guaranty Co. D 12/31/75	Apr. 9, 1968	May 24, 1968	Anchorage, AK; $50,000
Ploof Truck Lines, Inc., P.O. Box 47, Station "G", Jacksonville, FL; motor carrier, The Home Indemnity Co. (PB 2/15/75) D 11/25/75 [4]	Aug. 4, 1975	Nov. 25, 1975	Tampa, FL; $25,000
Reisch Trucking & Transportation Co., Inc., 819 Union Ave., Pennsauken, NJ; motor carrier, General Ins. Co. of America D 1/8/76	Feb. 4, 1972	Feb. 28, 1972	Philadelphia, PA; $50,000
Republic Freight System, Inc., 10990 Roe Ave., Shawnee Mission, KS; motor carrier, Seaboard Surety Co.	Feb. 20, 1975	Apr. 16, 1975	New York Seaport; $50,000
Sedalia, Marshall, Boonville Stage Lines, Inc., 5805 Fleur Drive, Des Moines, IA; air carrier, Employers Mutual Casualty Co.	Jan. 22, 1976	Jan. 29, 1976	Chicago, IL; $50,000
W. D. Smith Truck Line, P.O. Drawer "C", De Queen, AR; motor carrier, The Aetna Casualty & Surety Co.	Dec. 8, 1975	Dec. 13, 1975	Laredo, TX; $25,000
H. G. Snyder Trucking, Inc., 1111 Pitfield Blvd., St. Laurent, Que., Canada; motor carrier, Transamerica Ins. Co.	July 8, 1975	Jan. 26, 1976	Ogdensburg, NY; $50,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director; amount
Donal Scot Spradley, 13531 E. Ramona Drive, Whittier, CA; motor carrier, Pacific Employers Ins. Co.	Dec. 22, 1975	Jan. 19, 1976	Nogales, AZ; $25,000
E. G. Starner, "Sole Proprietor" 2344 Van Iburg Circle, Ft. Mitchell, KY; contract carrier, The Buckeye Union Ins. Co.	Jan. 8, 1976	Jan. 15, 1976	Cleveland, OH; $50,000
Transportation Service, Inc., 2021 S. Schaefer Hwy., Detroit, MI; motor carrier, St. Paul Fire & Marine Ins. Co. D 1/15/76	July 24, 1972	Aug. 16, 1972	Detroit, MI; $50,000
Tri-State Transportation Co., Inc., West Ave. & Central Railroad, Vineland, NJ; motor carrier, American Home Ins. Co. D 1/7/76	Jan. 3, 1975	Jan. 20, 1975	New York Seaport; $50,000
Virginia Carolina Freight Lines, P.O. Box 4988, Martinsville, VA; motor carrier, Utica Mutual Ins. Co. D 12/24/75	Dec. 23, 1974	Jan. 8, 1975	Norfolk, VA; $25,000

[1] Surety is Seaboard Surety Co.
[2] Surety is Argonaut Ins. Co.
[3] Surety is America Int'l. Ins. Co.
[4] Principal is Ploof Transfer Co., Inc.

(BON–3–03)

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

Decisions of the United States Court of Customs and Patent Appeals

(CA 76-3-ITC Investigation No. 337-TA-18)

IMPORT MOTORS LIMITED, INC., WORLD-WIDE VOLKSWAGEN CORP., RIVIERA MOTORS, INC., AND PORSCHE AUDI NORTHWEST, INC. v. UNITED STATES INTERNATIONAL TRADE COMMISSION, AND ENGELHARD MINERALS & CHEMICALS CORPORATION

1. APPEAL FROM UNITED STATES INTERNATIONAL TRADE COMMISSION

This opinion expresses the reasons for the CCPA decision announced January 22, 1976, which dismissed the appeal from a United States International Trade Commission order which discontinued appellants (independent distributors) as parties to the first stage of a Commission investigation under § 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, 88 Stat. 2053, 19 USC 1337, without prejudice to the right of appellants to intervene at a later stage of the investigation.

2. EFFECT OF A "FINAL DETERMINATION" RIPE FOR JUDICIAL REVIEW

The dispositive issue is whether the Commission's order denying participation in the first stage of an investigation under § 337 of the Tariff Act of 1930, as amended, 19 USC 1337, is or has the effect of a "final determination" ripe for judicial review under § 337(c), as amended.

3 ID

Strictly interpreted, the phrase "final determination of the Commission under subsection (d) or (e)" which appears in § 337(c), as amended, 19 USC 1337(c), refers to a final administrative decision on the merits, excluding or refusing to exclude articles from entry under subsection (d) or (e).

4. SECTION 337 (c) AS AMENDED

Section 337(c), as amended, 19 USC 1337(c), speaks only of determinations under subsection (d) or (e). Packaged treatment elsewhere in the statute of subsections (d), (e), and (f) would indicate that failure to include subsection (f) in subsection (c)

was a result of legislative inadvertence and that final decisions under subsection (f) would be appealable in the same manner as those under subsections (d) and (e).

5. LEGISLATIVE HISTORY–SECTION 337 (c) AS AMENDED

The legislative history as evidenced by the Senate Committee on Finance report indicates that a final decision of the Commission in favor of a complainant under subsection (d), (e), or (f) is not an appealable "final determination" until the Commission's decision has been referred to the President under § 337(g), as amended, 19 USC 1337(g), and approved or not disapproved within the statutory 60-day period. A final decision of the Commission unfavorable to a complainant under subsection (d), (e), or (f) would be a directly appealable "final determination," such a decision not being referrable to the President under § 337(g), as amended. The Senate Committee report and the provisions in § 337(c), as amended, for appeal by "[a]ny person adversely affected," under conditions identical to "appeals from decisions of the United States Customs Court," indicate an intent to provide appeal of such an unfavorable decision directly to the CCPA.

6. FINAL DETERMINATION – SECTION 337(c) AS AMENDED

An order of the Commission terminating participation in a preliminary proceeding, or terminating participation in all proceedings, could have the same operative *effect*, in terms of economic impact upon those terminated, as a final determination under subsections (d) and (e). Substance, not form, must control. Here, the Commission implicitly found that the economic interests of appellants would be adequately and sufficiently represented, in the first stage of the investigation, by the importer and the manufacturer.

7. UNITED STATES INTERNATIONAL TRADE COMMISSION – INVESTIGATION

The Commission, to expedite the performance of its functions (see § 603(a) of the Trade Act of 1974, 88 Stat. 2073, 19 USC 2482(a)), decided to conduct the present investigation in two distinct stages. In the first stage, the burden is on complainant Engelhard to prove a violation of § 337(a), as amended, to wit: (1) the existence of "[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either," and (2) the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States * * *." In the second stage, the Commission must consider the public interest as specified in subsections (d), (e), and (f): "the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers."

8. ID. – INVESTIGATION – TIME LIMIT

The Commission is operating with a new statute containing a one year (18 months in complicated cases) maximum time limit on its investigations. The Commission must investigate every alleged violation. Unnecessary and duplicative participants in the first stage could greatly delay the Commission's performance of its duties and risk or preclude its ability to complete an investigation within the legislatively mandated time limit.

United States Court of Customs and Patent Appeals,
February 3, 1976

Appeal from United States International Trade Commission,
ITC Investigation No. 337–TA–18

[Dismissed.]

Harvey Kaye (Spencer & Kaye) attorney of record, for appellants.
Rex E. Lee, Assistant Attorney General, *William Kanter*, *Michael H. Stein*, attorneys of record, Appellate Section, Civil Division.

[Oral argument on January 16, 1976 by Harvey Kaye for appellant, Import Motors Ltd. Inc. et al; Michael Stein for appellee, International Trade Commission and David W. Plant for appellee, Engelhard Minerals, etc.]

Before MARKEY, *Chief Judge*, and RICH, LANE and MILLER, *Associate Judges*, and ROBERT L. KUNZIG, *Associate Judge*, United States Court of Claims.

MARKEY, Chief Judge.

[1] This is an appeal from an order of the Presiding Commissioner entered October 17, 1975, in the above-entitled proceeding before the United States International Trade Commission. The full Commission, after review, affirmed the Presiding Commissioner's order on November 18, 1975. In the decision announced January 22, 1976 (63 CCPA —, — F.2d —, — USPQ — (1976)), this court dismissed the present appeal, and vacated the stay of further proceedings set forth in the order of this court dated December 3, 1975 (63 CCPA —, — F.2d —, 188 USPQ 102 (1975)). This opinion expresses the reasons for the decision announced January 22, 1976.

BACKGROUND

The "Notice of Investigation and Hearing" of the fundamental investigation was published in the Federal Register on July 23, 1975 (40 F.R. 30879). The notice recites that a complaint was filed with the United States International Trade Commission (Commission) on May 2, 1975, by Engelhard Minerals and Chemicals Corp. (Engelhard), alleging that the unlicensed importation and sale in the United States of Volkswagen, Audi, and Porsche 914 automobiles containing

monolithic catalytic converters, and of replacement monolithic catalytic converters therefor, are unfair methods of competition and unfair acts within the meaning of § 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, 88 Stat. 2053, 19 USC 1337,[1] by reason of the coverage of such monolithic catalytic converters by claims 1–4 in U.S. Patent No. 3,441,381 and claims 1, 2, 5, 6, 13, and 14 in U.S. Patent No. 3,565,830.[2] The notice named numerous entities as respondents,[3] including the manufacturer, Volkswagenwerk A.G. (VWAG), the importer, Volkswagen of America, Inc. (VWoA), and the four appellants, Import Motors Ltd., Inc., World-Wide Volkswagen Corp., Riviera Motors, Inc., and Porsche Audi Northwest, Inc. Each appellant is a corporate entity independent and separate from the others and from VWAG and VWoA. Thus, each appellant is an independent distributor, and a major portion of each appellant's business is the purchase of Volkswagen, Audi, and Porsche 914 automobiles from VWoA and sale of such automobiles to retail dealers in the territory of the distributorship.

The notice also recites that "failure of a party to file a response to each of the allegations which are the subject of this investigation as set forth in this notice * * * may be deemed to constitute a waiver of its right to appear and contest such allegations and shall authorize the Commission, without further notice to that party, to find the facts to be as alleged and to enter an order containing such findings."

Each appellant then filed a response with the Commission.

Another independent distributor not involved in this appeal Volkswagen Mid-America, Inc., one of the respondents in the notice filed with the Commission a motion "to withdraw as a party" to the investigation. On October 17, 1975, the Presiding Commissioner entered an order granting the motion filed by Volkswagen Mid-America, Inc., and further ordering that all independent distributors

---

[1] Section 337(a) of the Tariff Act of 1930, as amended by the Trade Act of 1974, 88 Stat. 2053, 19 USC 1337 (a), provides:

(a) Unfair Methods of Competition Declared Unlawful.—Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

[2] Engelhard's complaint also states that Volkswagen of America, Inc. has sought a declaratory judgment that both Engelhard patents are invalid and not infringed in a complaint previously filed in the United States District Court for the Southern District of New York (*Volkswagen of America, Inc.* v. *Engelhard Minerals and Chemicals Corp.*, 74 CIV. 4966). The Commission has denied a motion to suspend the present investigation, a motion based on the New York court action and citing § 337(b)(1), as amended.

[3] At oral hearing, counsel for the Commission indicated that the entities named as respondents in the notice were so named because of Engelhard's complaint and that the Commission has no requirement that a complainant establish that the respondents named in a complaint have an interest sufficient to require participation.

be "discontinued as parties to this proceeding under Section 337(a) without prejudice to the aforesaid independent distributors to intervene at a later stage of this proceeding in the event a violation of Section 337(a) has been established as persons interested in the Commission's determination under Section 337 (d), (e) and (f)." On October 21, 1975, the Presiding Commissioner issued an opinion explaining the reasons underlying the order of October 17, 1975. The full Commission then reviewed the Presiding Commissioner's order. In the Commission's order of November 18, 1975 (issued in written form on December 3, 1975), the Commission "concurred with the reasons set forth" in the Presiding Commissioner's opinion of October 21, 1975, incorporated the Presiding Commissioner's opinion in the Commission's order, and stated two additional reasons for discontinuing appellants "as parties to this proceeding without prejudice to the right of the aforesaid independent distributors [including appellants] to intervene at a later stage of this proceeding." (The Commission's order, and the Presiding Commissioner's opinion incorporated therein, appear as an Appendix herewith).

Appellants seek review of this action by the Presiding Commissioner, affirmed by the full Commission, discontinuing them as parties to the initial stage of the investigation but without prejudice to their right to intervene at a later stage.

Appellants' Contentions

Appellants, appealing as a unit represented by the same counsel, have basically three contentions: (1) that the Commission's order denying them participation in the initial stage of the investigation is "appealable now," i.e., that it is a "final determination" ripe for judicial review; (2) that they have an "unequivocal" right to such participation; and (3) that they have, at least, a conditional right to such participation (on this point, appellants urge that the Commission's order was an abuse of its discretion).

Appellants premise contention (1) on the "final determination" sentence in § 337(c) of the Tariff Act of 1930, as amended by the Trade Act of 1974, 88 Stat. 2054, 19 USC 1337(c):[4] "Any person adversely affected by a final determination of the Commission under

[4] The full text of § 337(c), as amended, 19 USC 1337(c), is:

(c) Determinations; Review.—The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

subsection (d)[5] or (e)[6] may appeal such determination to the United States Court of Customs and Patent Appeals." At oral hearing (held January 16, 1976), counsel for appellants made it clear that contention (1) is based solely on the quoted "final determination" sentence of § 337(c), as amended, and *not* on any provision of the Administrative Procedure Act (now subchapter II of chapter 5 and chapter 7 of title 5, USC).

Appellants premise contentions (2) and (3) on the following sentence in § 337(c), as amended: "Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 USC 551–59, a portion of what was originally the act popularly known as the "Administrative Procedure Act"]."

Commission's Contentions

Appellee United States International Trade Commission contends: (1) that its order discontinuing appellants in the initial stage of the investigation is not a "final determination" within the meaning of § 337(c), as amended, and that therefore, it is not presently appealable to this court; (2) that appellants do not have an unconditional right to such participation; and (3) that if appellants have a conditional right to such participation, nevertheless the Commission did not abuse its discretion because appellants' economic interests are adequately represented in the initial stage by the importer, VWoA, and the manufacturer, VWAG. (The Commission concedes that appellants, as independent distributors, have alleged sufficient economic interest to entitle them to participate *if* such interest were not otherwise represented.)

---

[5] Section 337(d), as amended, 19 USC 1337(d), provides:

(d) Exclusion of Articles From Entry.—If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

[6] Section 337(e), as amended, 19 USC 1337(e), provides:

(e) Exclusion of Articles From Entry During Investigation Except Under Bond.—If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

ENGELHARD'S CONTENTIONS

Appellee Engelhard Minerals and Chemicals Corp. essentially agrees with the position taken by the Commission below and on appeal.[7]

OPINION

[2] The dispositive issue is whether the Commission's order is ripe for judicial review under the new statute.[8] Our first consideration is whether the order is intrinsically a "final determination" under § 337(c), as amended, and, if it is not, whether its effect upon appellants is the equivalent of a final determination. We find the Commission's order neither a "final determination" nor an equivalent thereof in its effect upon appellants.

The Commission's order is not intrinsically a "final determination of the Commission under subsection (d) or (e)." [3] Strictly interpreted, that phrase refers to a final administrative decision on the merits, excluding or refusing to exclude articles from entry under subsection (d) or (e).[9]

[5] Moreover, the legislative history as evidenced by the Senate Committee on Finance report (*Report on Trade Reform Act of 1974*, S. Rep. No. 93–1298, 93d Cong., 2d Sess. (1974)) indicates that a final decision of the Commission on the merits in favor of a complainant under subsection (d), (e), or (f) is not an appealable "final determination" until the Commission's decision has been referred to the Presi-

[7] This position is, of course, contrary to that taken by Engelhard in the original complaint filed with the Commission, wherein appellants were named as respondents. Engelhard explains this change in position by quoting the following portion of the Presiding Commissioner's October 21, 1975 opinion:

> At the time of instituting this investigation it appeared uncertain as to the relation of distributors to imports and they were accordingly included as parties. It is now undisputed that Volkswagenwerk Aktiengesellschaft (hereinafter referred to as "VWAG") is the sole manufacturer of the Volkswagen automobiles in which the subject articles are incorporated. Further, Volkswagen of America, Inc. ("VWoA") is "the sole United States importer of automobiles and parts produced by VWAG."

[8] In need of legislative updating is 28 USC 1543:

> § 1543. Tariff Commission decisions.
>
> The Court of Customs and Patent Appeals shall have jurisdiction to review, by appeal on questions of law only, the findings of the United States Tariff Commission as to unfair practices in import trade, made under section 1337 of Title 19.

[9] [4] Section 337(f) provides for cease and desist orders. Section 337(c) speaks of appeal only of determinations under subsection (d) or (e). Packaged treatment elsewhere in the statute of subsections (d), (e), and (f) would indicate that failure to include subsection (f) in subsection (c) was a result of legislative inadvertence and that final decisions under subsection (f) would be appealable in the same manner as those under subsections (d) and (e).

dent under § 337(g), as amended,[10] and approved or not disapproved within the statutory 60-day period. The Senate Committee report, at 196–97, states:

> Further, under section 337(c), as amended, the Committee would extend the right to judicial review of final Commission determinations (of whether there is a violation of section 337 or whether there is reason to believe there is a violation) to complainants before the Commission, as well as continuing to permit owners, importers, and consignees of the articles involved in such determinations to secure such review. By final determination, as used in this section, the Committee means a Commission determination which has been referred to the President under amended section (g) of section 337, and has been approved by the President or has not been disapproved for policy reasons by the President within the 60 day period after referral of the determination. The judicial review provided is in the Court of Customs and Patent Appeals, in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the U.S. Customs Court.

A final decision of the Commission unfavorable to a complainant under subsection (d), (e), or (f) would be a directly appealable "final determination," such a decision not being referrable to the President under § 337(g). The first sentence of the above-quoted paragraph in the Senate Committee report, and the provisions in § 337(c) for appeal by "[a]ny person adversely affected," under conditions identical to "appeals from decisions of the United States Customs Court," indicate an intent to provide appeal of such an unfavorable decision directly to this court.

---

[10] Section 337(g), as amended, 19 USC 1337(g), provides:

(g) Referral to the President.—(1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e), there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and

(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f), with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c), be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) or subject to a cease and desist order under subsection (f) shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

[6] An order of the Commission terminating participation in a preliminary proceeding, or terminating participation in all proceedings, could have the same operative *effect*, in terms of economic impact upon those terminated, as a final determination under subsections (d) and (e). Substance, not form, must control. Cf. *In re Haas*, 486 F.2d 1053, 1055, 179 USPQ 623, 625 (CCPA 1973). The Commission implicity found that the economic interests of appellants would be adequately and sufficiently represented, in the first stage [11] of the investigation, by the importer, VWoA, and the manufacturer, VWAG. Appellants argue that their interests differ from VWoA because "VWoA could, insofar as its distributing functions are concerned, operate in a manner which does not make a profit * * *." Whatever the merits of appellants' argument are, the Commission's order did not terminate appellants' participation in the entire investigation. Appellants stated to the Commission and at oral argument here that they did not intend to take an active role concerning the unfair competition (patent infringement) issue in the first stage. and they conceded that the remaining respondents are in "as good" a position as they to defend against Engelhard's claim of economic injury in the first stage.

Appellants have been denied participation only in the first stage.[12]

---

[11] [7] The Commission, to expedite the performance of its functions (see § 603(a) of the Trade Act of 1974, 88 Stat. 2073, 19 USC 2482(a)), decided to conduct the present investigation in two distinct stages. In the first stage, the burden is on complainant Englehard to prove a violation of § 337(a), as amended, to wit: (1) the existence of "[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either," and (2) "the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States * * *." In the second stage, the Commission must consider the public interest as specified in subsections (d), (e), and (f): "the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." The Senate Committee Report, supra at 195, states: "[w]hile the Committee would *require* the Commission to seek advice and information from certain agencies and Departments, it is anticipated that the Commission *will permit* any party with relevant information to present such information to the Commission during the course of an investigation." (Emphasis added.)

[12] [8] The Commission is operating with a new statute containing a one year (18 months in complicated cases) maximum time limit on its investigations. The Commission must investigate every alleged violation. Unnecessary and duplicative participants in the first stage could greatly delay the Commission's performance of its duties and risk or preclude its ability to complete an investigation within the legislatively mandated time limit. Section 337(b)(1), as amended, 19 USC 1337(b)(1), provides:

> (b) Investigations of Violations by Commission; Time Limits.—(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

The International Trade Commission appears to be one of the few administrative agencies, if not the only administrative agency, which must conclude its investigation and make its determination within a specified time. That statutory limit could encourage intervention and dilatory, duplicative tactics by those who may be interested in increasing the burden on the Commission and thereby preventing its reaching a timely determination.

The second stage of the present investigation, when and if conducted, will consider the "public interest" factors specified in subsections (d), (e), and (f). The Commission concedes that appellants have a right to intervene and participate fully in the second stage when and if the Commission investigation reaches that point.[13] On this record, appellants have not shown that the order terminating their participation in the first stage has the operative effect of a "final determination under subsection (d) or (e)," giving appellants the right to appeal therefrom under 337(c), as amended. For that reason, we do not reach appellants' contentions (2) and (3), supra, neither of which are directed to the nature or effect of the Commission's order as a "final determination."

CONCLUSION

We conclude, therefore, that there has been neither an express "final determination of the Commission under subsection (d) or (e)," within the meaning of § 337(c) or an action with respect to the appellants which has the effect of such a final determination. Under those circumstances, appellants have no present right of appeal to this court.

As announced heretofore, the appeal is *dismissed*.

[13] Counsel for the Commission stated at oral hearing:

[W]e would like to make if clear that the appellants are not being terminated as parties for purposes of the entire proceedings. They are being terminated as parties for a limited phase of the proceedings and that is the initial determination that there is a violation, an unfair trade practice.

APPENDIX

United States International Trade Commission, Washington, D.C.

[337-TA-18]

MONOLITHIC CATALYTIC CONVERTERS

Order

The United States International Trade Commission in a notice published in the *Federal Register* on October 31, 1975 (40 FR 50752) in the Monolithic Catalytic Converters Investigation No. 337-TA-18 ordered full Commission review of the order of Presiding Commissioner Ablondi dated October 17, 1975, which granted the application of Volkswagen Mid-America, Inc., to withdraw as a party, and discontinued Midvo, Inc., World-Wide Volkswagen Corp., Volkswagen Atlantic, Inc., Import Motors Limited, Inc., Riviera Motors, Inc., and Porsche Audi Northwest, Inc., as parties without prejudice to their intervening at a later stage of this proceeding.

Volkswagen Mid-America, Inc., Midvo, Inc., World-Wide Volkswagen Corp., Volkswagen Atlantic, Inc., Import Motors Limited, Inc., Riviera Motors, Inc. and Porsche Audi Northwest, Inc., which are independent distributors of imported automobiles incorporating monolithic catalytic converters, purchase the units from the importer Volkswagen of America, Inc.

Upon consideration of written and oral submissions and the legal arguments of counsel at the public hearing on November 6, 1975, the Commission concurred with the reasons set forth in Presiding Commissioner Ablondi's opinion dated October 21, 1975 (a copy of which is annexed hereto and made a part of this order), and, for the additional reasons that (1) the aforementioned distributors have made no showing that they can assist the Commission at this stage of the proceeding under section 337(a) and (2) the inclusion of the aforesaid distributors would only burden and delay this complicated proceeding, the Commission on November 18, 1975—

ORDERED that the application of Volkswagen Mid-America, Inc., to withdraw as a party to this proceeding is granted; and

FURTHER ORDERED that Midvo, Inc., World-Wide Volkswagen Corp., Volkswagen Atlantic, Inc., Import Motors Limited, Inc., Riviera Motors, Inc., and Porsche Audi Northwest, Inc., are discontinued as parties to this proceeding without prejudice to the right of the aforesaid independent distributors to intervene at a later stage of this proceeding.

By order of the Commission:

KENNETH R. MASON,
Secretary.

ATTACHMENT

Issued December 3, 1976

Before the United States International Trade Commission Washington, D.C. 20606

In the matter of:

MONOLITHIC CATALYTIC CONVERTERS } DOCKET NO. 337-TA-18

Opinion

An application has been made by Volkswagen Mid-America, Inc. (hereinafter referred to as "Mid-America") to remove Mid-America as a respondent and a party to this proceeding. It is contended that Mid-America is not covered by the statutory provisions of Section 337(a) of the Tariff Act of 1930, as amended (88 Stat. 2053). Counsel for Mid-America, who also represents remaining independent distributors in its submission states, as follows:

> The statute conferring jurisdiction*—refers to "importation" of articles. Mid-America is not importing; rather, Volkswagen of America, Inc. (hereinafter "VWoA") is the importer. The statute also refers to "or in their sale by the owner, importer, consignee or agent of either". It is believed by Mid-America that a mere sale alone is not contemplated by the statute, but the sale must be one which is connected with the importation. Under this interpretation, Mid-America is not covered by the statutory jurisdictional basis for the investigation and should be removed as a party.

*19 U.S.C. 1337(a).

At the time of instituting this investigation it appeared uncertain as to the relation of distributors to imports and they were accordingly included as parties. It is now undisputed that Volkswagenwerk Aktiengesellschaft (hereinafter referred to as "VWAG") is the sole manufacturer of the Volkswagen automobiles in which the subject articles are incorporated. Further, Volkswagen of America, Inc. ("VWoA") is "the sole United States importer of automobiles and parts produced by VWAG." Further, VWoA admits that the distributors "are independent, completely independent. There is no agency relationship in law. They purchase automobiles and they distribute them."

Under section 337(b), Congress has authorized the Commission to conduct an investigation for the express purpose of determining whether a violation of section 337 exists. A violation is defined in section 337(a):

> *Unfair Methods of Competition Declared Unlawful.*—Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

Congress has placed upon the Commission a time limitation of twelve (12) months in which to complete its determination, and, in certain complicated proceedings, extended the time limit to eighteen (18) months.

It is clear that in order to adhere to the strict time limitations placed upon the Commission, and in light of the nature of the proceeding, that only those necessary parties, who may be directly affected by Commission action under Section 337(a), should have the opportunity of full participation as parties under Section 337(a). To compound an already complex proceeding with unnecessary parties may very well act as a restraint upon the Commission's ability to complete its determination within the time constraints placed thereon by law.

There is also involved the exchange of highly confidential business, marketing and manufacturing data which militates against a wide dissemination to any interested person unless a direct interest can be ascertained. The Commission, in addition, should have a wide latitude

in conducting and managing its investigations to accomplish its legislative mandate.

It appears that participation by the independent distributors is not necessary to develop the facts in this investigation pursuant to Section 337(a). Furthermore, no showing is made by the independent distributors that they can contribute and assist the Commission to fulfill its responsibilities under Section 337(a). The independent distributors are, however, naturally interested and concerned in the outcome thereof, as are all the persons who use the article in question. It is contemplated that such interested persons can contribute to the Commission determination under Section 337 (d), (e) and (f) by submission or presentation of views when a violation has been established under 337(a).

I accordingly grant the application of Mid-America, which is one of approximately 1,700 independent distributors of Volkswagen autos and products, to withdraw from the proceeding. The legal argument made by counsel for Mid-America likewise applies to Midvo, Inc., Imports Motors Ltd., Inc., Volkswagen Atlantic, Inc., World-Wide Volkswagen Corporation, Riviera Motors, Inc. and Porsche Audi Northwest, Inc. who are independent distributors. They should not be parties to the Commission deliberations under 337(a) for the reasons above set forth. This decision, however, is without prejudice to the aforesaid independent distributors and others to appear as interested persons in connection with any action the Commission may take with regard to section 337 (d), (e) and (f).

It is the intention in conducting this investigation to first hear all of the issues concerning Section 337(a) and in the event that there is a violation of 337(a), to then address the issues insofar as section 337 (d), (e) and (f) are concerned and expect the advice and opinion of all interested persons.

DATED October 21, 1975

ITALO H. ABLONDI,

Presiding Commissioner

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4629)

ANDREW AKINS *v.* UNITED STATES

Opinion on Cross-Motions for Summary Judgment

Court No. 74–11–03228

Port of Calais (Portland, Me.)

[Judgment for defendant.]

(Decided January 26, 1976)

David C. Crosby, Thomas N. Tureen and *Barry A. Margolin* for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis,* trial attorney), for the defendant.

BOE, Chief Judge: Plaintiff has moved for summary judgment under rule 8.2 of this court. Defendant, agreeing that no genuine issue of fact exists, has cross-moved for summary judgment in its favor.

From the pleadings and from the testimony submitted by affidavits, it appears that on July 16, 1974, plaintiff, a United States citizen, an Indian by race and a member of the Penobscot nation, entered the United States from Canada with hiking boots purchased in Canada for his own personal use. The merchandise in question was assessed at Calais, Maine border station with duty in the sum of $1.20 pursuant to item 700.45, Tariff Schedules of the United States, which provides:

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

PART 1. – FOOTWEAR; * * *

Subpart A. – Footwear

*	*	*	*	*	*	*	
Footwear, of leather (except footwear with uppers of fibers):							
*	*	*	*	*	*	*	

Other:		
* * * * * * *		
For other persons:		
* * * * * * *		
Other:		
* * * * * * *		
700.45	Valued over $2.50 per pair.	10% ad val.

The assessed duty was paid by the plaintiff and protest formally made in which an exemption from any duty was claimed pursuant to article III of the Treaty of Amity, Commerce and Navigation, 8 Stat. 116, 117 (1794) (hereinafter referred to as the Jay Treaty). The protest was denied and a summons timely filed thus commencing the within civil action.

The defendant in its cross-motion denies the contention of the plaintiff and claims as its principal defense that article III of the Jay Treaty has been abrogated by the War of 1812.

I

Article III of the Jay Treaty provides:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great-Britain.

All goods and merchandize whose importation into his Majesty's said territories in America, shall not be entirely prohibited, may freely, for the purposes of commerce, be carried into the same manner aforesaid, by the citizens of the United States, and such goods and merchandize shall be subject to no higher or other duties, than would be payable to his Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner, all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by his Majesty's subjects, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said states. And all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively, paying duty as aforesaid.

No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.[1]

* * * * * * *

There has been a lack of uniformity with respect to the effect of war upon a treaty existing between belligerent countries. Authorities on international law have expressed divergent opinions. Although in early years the doctrine generally prevailed that war, ipso facto, abrogated all treaties uniformally, it has become more universally accepted that the abrogation of a treaty provision is dependent upon its intrinsic nature and character.

In the early history of this country, the Supreme Court in the case of *Society for the Propagation of the Gospel* v. *New Haven*, 21 U.S. (8 Wheat.) 206, 219 (1823), adhering to a more flexible construction

[1] It is further provided under article XXVIII of the Jay Treaty that article III is permanent in nature. In 1796, the United States and Great Britain further agreed to the explanatory article of May 4, 1796, 8 Stat. 130, which provided in part:

> That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

with respect to the doctrine relating to treaty abrogation, therein stated:

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

The decision in the foregoing case affirmed the right of a British corporation to continue to own and hold lands in the state of Vermont by virtue of the protective provisions of article VI of the treaty of 1783, 8 Stat. 80, 83, and confirmed by article IX of the Jay Treaty. Inasmuch as the provisions of the respective treaties were construed as relating to and affecting vested property rights to be owned and transferred in perpetuity, the provisions thereof were held not to be abrogated by the War of 1812.

The decision of the Supreme Court in *Society for the Propagation of the Gospel* v. *New Haven*, *supra*, relating as aforesaid to the survival of vested property rights confirmed by article IX of the Jay Treaty, was applied in the case of *McCandless* v. *United States ex rel. Diabo*, 25 F. 2d 71 (3d Cir. 1928), to the right granted by article III of the Jay Treaty to the subjects of Great Britain, United States citizens and all Indians to "pass" and "repass" the boundary between Canada and the United States. The court of appeals therein found that an Indian, born on a reservation in Canada, who made a number of trips from Canada to the United States in the course of his employment was not in violation of existing immigration laws. In so doing,

the court concluded that the provision of article III granting the right to "pass" and "repass" was a permanent and vested right which at the most was only suspended and not abrogated by the War of 1812.

By way of historical background, the court pointed out that the boundary line between Canada and the United States—defined by the Jay Treaty—passed through lands held and occupied by a confederation of Indian tribes or nations.[2]

Throughout the Revolutionary War as well as the War of 1812, the confederacy as a whole remained neutral leaving to the individual tribe the discretion to side with either belligerent. It would appear that the apparent neutrality of the Indian confederacy as a whole during the respective periods of hostility between the United States and Great Britain influenced the court of appeals in its conclusion that "* * * there was no reason why either of the contending nations in 1812 should desire to change the status of the Six Nations and thereby anger and drive them into hostilities." 25 F.2d at 72. See also *Akins* v. *Saxbe*, 380 F. Supp. 1210, 1212–13 (N.D. Me. 1974).

Plaintiff has urged that the *McCandless* decision is controlling of the issue involved in the case at bar, notwithstanding the subsequent decision of the United States Supreme Court in the case of *Karnuth* v. *United States ex rel. Albro*, 279 U.S. 231 (1929). In the *Karnuth* case, two Canadian residents in support of their entry into the United States free from existing immigration restrictions invoked specifically the first paragraph of article III of the Jay Treaty granting: "To His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * *."

The court citing with approval the decision in the case of *Society for the Propagation of the Gospel* v. *New Haven*, *supra*, further defined the distinction between treaty provisions creating vested property rights and those rights and privileges promissory and prospective in character. In so doing, the court stated (279 U.S. at 239–42):

> These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision,

[2] The Penobscott tribe of which the plaintiff is a member was one of the nations comprising this confederacy.

neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, § 1135; 2 Hyde, International Law, § 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties * * *.

* * * * * * *

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

We are not unmindful of the agreement in Article XXVIII of the Treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting," but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See *Texas, & Railway Co.* v. *Marshall*, 136 U.S. 393, 403; *Bassett* v. *Johnson*, 2 N.J. Eq. 154, 162.

Because of the possibility of treasonable intercourse that might occur during hostilities as a result of unrestricted passage and because such right of free passage might "be incompatible with conditions following the termination of war," the court determined that the provisions of article III relating to "passing" and "repassing" could not be deemed vested property rights but rather promissory and prospective in character and, accordingly, abrogated by the War of 1812.

It is deserving of note that in the cases of *McCandless* v. *United States* and *Karnuth* v. *United States*, previously referred to, the issue in question was restricted to the provisions of the first paragraph of article III relating solely to the free "passing" and "repassing" of persons across the boundary between the United States and Canada. However, in the case of *United States* v. *Garrow*, 24 CCPA 410, 88 F. 2d 318 (1937), *cert. denied*, 302 U.S. 695 (1937), the Court of Customs and Patent Appeals considered the issue closely akin to that existing in the case at bar. In the *Garrow* case an Indian, residing in Canada, entered the United States bringing with her certain baskets. Protesting the imposition of a duty on the baskets pursuant to paragraph 411 of section 1 of the Tariff Act of 1930, the plaintiff claimed an exemption therefrom pursuant to the provisions of article III of the Jay Treaty. The court, following the reasoning of the United States Supreme Court in the *Karnuth* decision, held that the provisions of article III of the Jay Treaty had been abrogated by the War of 1812, and, accordingly, the protestant was subject to the duty exacted on the merchandise carried with her.[3]

In its decision, the court stated (24 CCPA at 418):

> The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our Government. See *Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven and William Wheeler*, 8 Wheat. 464 (494).
>
> It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, Vol. V, paragraph 779.

The plaintiff, however, urges that the reliance of the court in the *Garrow* decision upon the *Karnuth* case was misplaced in that the provision of article III of the Jay Treaty relating to the exemption of Indians from duty when carrying their personal belongings and effects is separable from that portion of the article relating to the

[3] In the *Garrow* case, the court pointed out that an appeal did not result in the *McCandless* case possibly because of the "fact that on April 2, 1928, an act of Congress was approved which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border (45 Stat. 401)." 24 CCPA at 416.

free passage of the United States citizens, British subjects and Indians. This court recognizes that the abrogation of one provision of a treaty necessarily does not strike down the entire treaty nor other independent provisions thereof which should properly survive. *Techt* v. *Hughes*, 128 N.E. 185 (N.Y. Ct. App. 1920), *cert. denied*, 254 U.S. 643 (1920). However, viewing the respective provisions of article III independently as well as in their entirety, it would appear that a consistent logical construction thereof would preclude the application of the doctrine of separability to the provisions of the treaty here under consideration.

The rationale of the *Karnuth* decision is predicated upon the premise that the possibility of treasonable intercourse in the time of war justifies the abrogation of that portion of article III relating to free "passing" and "repassing" of the person. The *Garrow* decision has extended that reasoning to apply to that portion of article III relating to the exemption from duty upon "personal belongings and effects" of Indians when "passing" or "repassing" the boundary between the United States and Canada. The possibility of treasonable intercourse occurs as the result of the physical movement of the individual. It would be incredulous to assume that the act of carrying "personal goods and effects" while "passing" or "repassing" would cause the possibility of treasonable intercourse to be less likely. The carrying of "personal belongings and effects," and the exemption of duty thereon, as referred to in article III of the Jay Treaty, is dependent on the physical passage of the individual. If, therefore, the right of physical passage is abrogated by war, it logically follows that the right and privilege relating to the carrying of "personal goods and effects" and the exemption from duty thereon, which are an integral part of the physical movement, are, likewise abrogated.

Nor can this court accept the argument urged by the plaintiff that the historical friendship between the Penobscot tribe and the United States would make the possibility of treasonable intercourse unlikely, thereby removing the reason for the abrogation of article III. Neither the Jay Treaty nor the *Karnuth* nor *Garrow* decisions contemplate any distinction between Indians who may have been friendly or unfriendly to the American colonies or the American government. Nor has the distinction been made between Indians residing within the territorial boundaries of Canada or of the United States.

Throughout the entire provisions of article III and in each of the foregoing decisions, reference has been made to United States citizens, to subjects of Great Britian and to Indians as respective classes. To differentiate between persons, groups or tribes in each of said classes

who may have been friendly or unfriendly would require the adoption of a subjective test and standard as to the possibility of treasonable intercourse which would be impossible of determination.

This court is likewise unwilling to accept the observation of the court of appeals in the *McCandless* case that Indians, not signatories to the treaty but third party beneficiaries thereunder, should be afforded greater rights than the signatories themselves. The contracting parties in executing the Jay Treaty were the United States and Great Britain. The citizens and subjects of each country including the Indians residing within their respective territories continued to enjoy such rights and privileges provided by article III thereof only as long as the agreement itself remained binding between the original contracting parties. No issue is taken with the several decisions cited by the plaintiff in which it has been repeatedly held that the promises and obligations of the United States government to the Indian resident within its boundaries must be upheld and that the abrogation of such promises cannot be lightly implied. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Payne*, 264 U.S. 446 (1924); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). However, an examination of the authorities in question will reveal that the statement so often enunicated by the courts has been applicable to those cases involving treaties made by the United States government directly with the Indian tribe or tribes. No parallel can be drawn therefrom with the applicable provisions of article III of the Jay Treaty under consideration herein.

In this connection it is of interest to note the construction placed by the courts of Canada on the question here in issue. In the case of *Francis* v. *The Queen*, 4 Dominion Law Reports 760 (1955), a petition was filed in the Exchequer Court of Canada by a Canadian Indian seeking an exemption under the provisions of article III of the Jay Treaty from a duty imposed on personal goods brought by him from the United States. The court, holding that the provisions of article III had been abrogated by the War of 1812, cited with approval the decisions of *Karnuth* v. *United States*, *supra*, and *United States* v. *Garrow*, *supra*, stating (4 D.L.R. at 776):

> * * * While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. * * *[4]

[4] On appeal the Supreme Court of Canada, 3 D.L.R. (2d) 641 (1956), although affirming the trial court, predicated its decision on the premise that the Canadian law required such rights and privileges as provided in article III of the Jay Treaty to be first implemented and sanctioned by legislation. Such implementation had not been enacted.

The plaintiff in his presentation of all issues that might serve to preserve the continued viability of article III of the Jay Treaty has urged that the provisions thereof, at the most, only were suspended during the War of 1812. Contending that the exemption of the personal goods and effects of Indians from duty is a commercial provision, attention has been directed to *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930). A careful examination of this case, however, would not lead to the conclusion offered by the plaintiff. In the aforecited case a German ship entering the port of New York was subjected to a tonnage duty pursuant to existing statutes. Plaintiff's contention that the ship was exempt from duty by virtue of the Hanseatic Convention of 1827 and the Prussian Treaty of 1828 presented the issue as to whether the said treaties were abrogated by World War I. In its decision the court recognized that treaties which are commercial in character may be considered either suspended or abrogated at the option of the belligerents. Accordingly, in view of the intention of the contracting parties determined from the surrounding controlling circumstances, the treaties there in question were held to have been only suspended by World War I and in full force and effect after the termination of hostility. In its determination, the court clearly distinguishing the decision of the Supreme Court in the case of *Karnuth* v. *United States*, *supra*, stated (45 F.2d 421):

> The holding in Karnuth v. United States, 279 U.S. 231, 49 S. Ct. 274, 73 L. Ed. 677, does not, in my judgment, cover the present facts. In that case, it was decided that article 3 of the Jay Treaty of 1783, providing for free passage of American and British nationals across the Canadian border, had been annulled and not merely suspended by the War of 1812. The theory of the decision clearly distinguished it from the case at bar. The free passage of persons, as was said by the court, "* * * is inconsistent with a condition of hostility. * * * The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war." 279 U.S. 239, 49 S. Ct. 274, 277, 73 L. Ed. 677.
>
> It can readily be understood that the mere occurrence of war should have that necessary effect on rights of free passage and repassage. Before the war, each state may have felt secure in the expectation of a lasting peace. The incidence of war destroys that expectation; what has happened once may happen again. It is therefore necessary to reconsider the wisdom of allowing free passage over our unprotected borders and, in the meantime, not to recognize a treaty right thereto. The present case presents no such problem. If the question involved were the complete exclusion of German vessels, the analogy might be a fair one. The

> issue here is different. The right of entry is not denied; the only question presented is the treaty limitation on the power to tax. Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied. * * *

In the *Rickmers* case, the sole issue under consideration involved the continued validity of the treaty restrictions to assess a tonnage tax. Neither the exclusion of the vessel was in issue nor, in fact, was the right of entry denied. In the instant case, on the other hand, the duty exemption provided for in the third paragraph of article III related to the "personal goods and effects" of Indians carried when "passing" or "repassing" the boundary. The application of the duty exemption only to the "personal goods and effects" of the Indians when "passing" and "repassing" as distinguished from "goods in bales, or other large packages" serves to emphasize the intent that such a right and privilege was not commercial but personal in character and interwoven with the actual physical passage of the Indians—a right separately and individually granted under the provisions of paragraph 1 of article III. If the right of "passing" and "repassing" of persons lends itself to the possibility of treasonable intercourse, as held in the *Karnuth* case, the joinder therewith of a duty exemption on "personal goods and effects" when so "passing" or "repassing," indeed, cannot be said to remove that possibility.

This court, accordingly, concludes that the decisions in *Karnuth* v. *United States, supra,* and *United States* v. *Garrow, supra,* are properly determinative of the facts and issues in the instant action and that the applicable provisions of article III of the Jay Treaty, relied on by the plaintiff herein, have been abrogated by the War of 1812.

II

Although the foregoing determination would preclude the necessity to consider further issues in connection with its decision, the court is desirous of addressing itself to an additional question presented briefly by the defendant in the case at bar. I refer to the relationship existing between a treaty of the United States and a subsequent expression of Congress evidencing an inconsistent provision.

Article VI of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land * * *.

It has been repeatedly held that the foregoing constitutional provision in designating a treaty and a congressional act as the supreme law of the land places both in parity with each other. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Whitney* v. *Robertson*, 124 U.S. 190 (1888).

However, when each instrument relates to a common subject matter and at the same time contains inconsistent provisions, some standard must be adopted to determine which shall prevail. In construing such conflicting instruments every reasonable effort will be made by the courts to interpret them in a manner so as to give effect to both. *Whitney* v. *Robertson, supra; Cook* v. *United States*, 288 U.S. 102 (1933).

In the case of a nonself-executing treaty, little difficulty is encountered where it appears that the treaty instrument may be in conflict with statutory provisions. Inasmuch as it is the function and obligation of the Congress to implement the nonself-executing treaty by appropriate legislation, it follows that the Congress thereafter may amend, modify and even rescind its former implementing legislation.

Thus, it is only with respect to the relationship between self-executing treaties and conflicting congressional acts that a resolution as to their respective applicability must be made. The distinction between nonself-executing and self-executing treaties and their respective relationship with subsequent acts of Congress has been clearly stated in the case of *Whitney* v. *Robertson*, *supra* at 194:

> * * * A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department,

> it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. * * *

Again, in the case of *Reid* v. *Covert, supra* at 18 Mr. Justice Black, speaking for the Court, stated:

> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

An exhaustive consideration of this question was made by the Supreme Court of the United States in the case of *Chae Chan Ping* v. *United States*, 130 U.S. 581 (1889). In the foregoing case, commonly known as "*The Chinese Exclusion Case*" challenge was made to the congressional act of 1888 "* * * as being in effect an expulsion from the country of Chinese laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress" (at 599–600). The Court (at 600), in upholding the validity of the act in question, stated:

> * * * The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.

Recognizing that national interest may demand that the Congress exercise the authority imposed upon it by the Constitution, notwithstanding that such an act might contravene prior treaty commitments, the Court (at 600–601), continued:

> * * * It will not be presumed that the legislative department of the Government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the Government in disregarding their stipulations, but demand in the interests of the

> country that it should do so, there can be no question. Unexpected events may call for a change in the policy of the country. * * *

The Court in the *Chinese Exclusion Case* clearly differentiated between rights and interests created by a treaty which may have become vested and rights which are personal in character and pertain to privileges to be exercised only by the individual in the future. The Court (at 601–602), further stated:

> This act, as seen, applied in terms only to the future. Of course, whatever of a permanent character had been executed or vested under the treaties was not affected by it. In that respect the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected. The validity of this legislative release from the stipulations of the treaties was of course not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *

The Court (at 609), continued:

> * * * The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character.* * *

In light of the foregoing, it is proper to examine the successive statutes relating to the same rights and privileges provided for in article III of the Jay Treaty enacted by the Congress pursuant to the powers vested in it by article I, section 8 of the Constitution providing:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; * * *

In 1799 the Congress enacted legislation, the provisions of which closely pattern the language contained in article III of the Jay Treaty, section 105 thereof providing:

> *And be it further enacted,* That no duty shall be levied or collected on the importation of peltries brought into the territories of the United States, nor on the proper goods and effects of whatever nature, of Indians passing, or repassing the boundary line afore-said, unless the same be goods in bales or other large pack-

> ages unusual among Indians, which shall not be considered as goods belonging bona fide to Indians, nor be entitled to the exemption from duty afore-said. * * * [1 Stat. 627. 702.]

Inasmuch as the provisions of article III of the Jay Treaty were self-executing, the statutory provisions aforequoted were not enacted for the purpose of implementing the treaty but, as stated in section 104 of the act, to conform the statutes of the United States to the treaty provisions.

From time to time thereafter Congress enacted repeated legislative acts providing for the same duty exemption as contained in section 105 of the statutue aforequoted. The 43d Congress of 1873–1874 enacted section 2515 as a part of the Statutes at Large entitled Revised Statutes of the United States. This section incorporated the identical language found in section 105 of the act of 1799. In a revision of 1878, section 2515 was again repeated. In the Tariff Act of March 3, 1883, 22 Stat. 488, 523, section 2512 was enacted which again incorporated substantially the same language as contained in previous statutory sections.

It was not until the enactment of the Tariff Act of 1890, 26 Stat. 567, 608, that a substantial change in language appears. In paragraph 674 of section 2 thereof, the prior statute was amended to provide:

> Peltries and other usual goods and effects of Indians passing or repassing the boundary line of the United States, under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That this exemption shall not apply to goods in bales or other packages unusual among Indians.

In the tariff revision of 1894, 28 Stat. 509, 543, paragraph 582 was enacted reincorporating the identical language contained in the Tariff Act of 1890, aforequoted.

It will be noted that the provisions of the Tariff Act of 1890 and their reincorporation in the tariff revision of 1894 changed significantly the provisions of the original congressional act of 1799. Instead of permitting the duty-free entry of *all* peltries brought into the territories of the United States, the latter provision restricted the exemption only to "peltries and other usual goods and effects" of Indians, subject to such regulations as the Secretary of the Treasury may prescribe.

In the tariff act enacted by the Congress in 1897, 30 Stat. 151, 213, section 34 thereof repealed, *inter alia*, paragraph 582 of the Tariff Act of 1894 and all other acts inconsistent therewith.

Since the year 1897, neither the statutes nor the tariff schedules of the United States have provided an exemption from the payment of duty by Indians "passing" or "repassing" across the boundary between the United States and Canada with their personal belongings or their own proper goods. On the contrary, articles of personal property such as hunting boots, the merchandise which is the subject of the instant action, is the subject of duty (item 700.45, TSUS).[5]

As this court has hereinbefore indicated, the right granted by article III of the Jay Treaty as well as by subsequent congressional acts cannot be construed other than as a privilege personal and nontransferable in character. The abrogation or recision of this right in no manner affected the interest of those persons who heretofore had exercised this privilege. In short, the duty-free privilege granted by the Jay Treaty as well as by statute did not confer upon the beneficiaries a vested interest of such a permanent character that a recision thereof constituted an abrogation of an executed proprietory right.

The self-executing provisions of article III of the Jay Treaty being only promissory in character, the question presented is the effect of subsequent "expressions" of the Congress upon the specific duty-free privileges granted thereunder.

Had the Congress by legislation expressly and directly repealed the duty-free privilege provided in article III of the Jay Treaty, no doubt would exist that such a statute, enacted subsequent in time to the treaty and constituting the "* * * last expression of the sovereign * * *," would control and render the treaty provisions a nullity, *Reid* v. *Covert, supra; Chae Chan Ping* v. *United States, supra.* However, as previously referred to herein, commencing in 1799, the Congress in the exercise of the exclusive power delegated to it by the Constitution expressed its policy with respect to the exaction of duty from Indians who "passed" and "repassed" the boundary between the United States and Canada carrying with them peltries and their personal belongings. Notwithstanding that the original as well as the several subsequent statutes enacted by the Congress contained similar language to that provided in article III of the Jay Treaty and were in conformity therewith, said statutes constituted and continued to constitute an independent declaration of legislative

[5] Although personal exemptions exist under the present Tariff Schedules of the United States, no evidence has been submitted to the court that the particular merchandise herein would fall within those provisions.

policy and intent. The subsequent amendments provided for in the Tariff Acts of 1890 and 1894, the express repeal of all prior acts relating to the duty exemption in question provided in the Tariff Act of 1897 and the enforcement of duty provisions thereafter by administrative officials lend validity to the interpretation that the Congress, pursuant to its constitutional duty and obligation, deemed that the passage of 100 years required a change in the tariff policy of this country. The specific inclusion of personal goods and belongings in subsequent tariff acts and tariff schedules of the United States likewise serves to corroborate the congressional intent to nullify the personal privilege which originally had been granted by article III of the Jay Treaty.

This court does not agree with the admonition of plaintiff's counsel that a concurrence in the reasoning of some of the appellate court decisions referred to herein would constitute a "perpetuation of an historical injustice." Nor can this court accept the premise, sometimes offered in order to reach a desired result, that the reasoning of earlier appellate decisions may have been eroded and become archaic through the passage of time.

Many wrongs may have been committed against the Indian people. The expiation of past injustices to a minority group of our citizens, however, cannot be accomplished by a present refusal to adhere to the decisions of our appellate courts, which, independent of the rule of stare decisis, are deemed will reasoned and sound.

Indeed, the obligation of any strong and independent judiciary must be to zealously guard and protect the rights of minorities. But in so doing, reasoned objectivity in the exercise of judicial determination cannot be sacrified.

It is the opinion of this court that the provisions of article III of the Jay Treaty of 1794 have been abrogated and are no longer in force and effect, nor constitute "the supreme law of the land" as they may relate to the plaintiff and the issues raised by him in his motion for summary judgment. Accordingly, the cross-motion of the defendant for summary judgment be and is hereby granted and the motion of the plaintiff for summary judgment is in all things denied.

Let judgment be entered accordingly.

(C.D. 4630)

RHODIA, INC. *v.* UNITED STATES

Memorandum Opinion and Order

Court Nos. 70/2988, etc.

Port of New York

[Plaintiff's motion for judgment on the pleadings denied; defendant's motion for summary judgment granted.]

(Dated January 30, 1976)

Sharretts, Paley, Carter & Blauvelt (*Steven R. Stern* and *Patrick D. Gill* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

WATSON, Judge: In the absence of any factual dispute, these cross-motions [1] raise again the issue decided in *Rhodia, Inc.* v. *United States*, 69 Cust. Ct. 19, C.D. 4366 (1972), in which it was held that an importation of a compound commonly called N-methyl glucamine was properly classifiable as a monomethyl monoamine [2] rather than as other nitrogenous compounds.[3]

The information supplied in support of these motions has been more complete and well rounded than that presented in the prior case, proving, I suppose, that in areas of specialized knowledge the initial impression of being well informed can be illustory. As a result, I am now convinced that the conclusion reached in the first *Rhodia* case was erroneous. The doctrine of *stare decisis* is, of course, no basis for the perpetuation of an error which has been clearly and convincingly demonstrated. *United States* v. *Mercantil Distribuidora, S. A., et al.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957).

Although the resolution of these motions has not been without its initial difficulties, the outcome of close study leaves no doubt in my mind as to the incorrectness of the first decision.

The affidavits submitted in support of defendant's motion establish with impressive authority precisely in which respects the prior decision was mistaken. Generally speaking, it was wrong to regard the language of item 425.20 as indicating the existence of a "class" of monoamines whose extent was limited only by the ingenuity of

[1] Plaintiff moved for judgment on the pleadings and defendant cross-moved for summary judgment.
[2] Item 425.20 of the TSUS.
[3] Item 425.52 of the TSUS.

chemists in making substitutions apart from the single amine function. Similarly, it was wrong to speak of the importation at issue as a "form" of monoamine as if it were a variety of an *eo nomine* substance rather than another substance altogether.

The weight of the expert opinion now before the court is that in correct and accurate chemical terminology there is only one substance in the category monomethyl monoamine (which is methylamine, not the merchandise at bar) and the importation cannot be properly named as if it were a variety of monoamine. To do so would violate the prevailing rules of nomenclature by which chemists abide and result in errors and anomalies too numerous to detail here.

Contrary to what was thought in the original opinion, it now appears that the certainty and predictability of chemical tariff classification was not being fostered. Although I would certainly not rule out the possibility that chemicals may be classified under names which are popular or loose, the interests of certainty are probably best served by ordinarily utilizing the systematic terminology sanctioned by the acknowledged authoritative sources.[4]

As is pointed out by Dr. Loening, the classification of the importation as a monoamine is inconsistent with the nomenclature rules of both the *International Union of Pure and Applied Chemistry* and *Chemical Abstracts*.

Under these rules, the first step in arriving at a correct name for a compound is to determine the principal functional group. In this process hydroxyl groups outrank amino groups, or stated differently, hydroxyl groups are given a higher priority than amino groups for citation as the principal group in a compound. This leads to the naming of the importation as an alcohol and not as an amine since the priority of the hydroxyl groups is obvious in the structural formula depicted in the prior decision at page 20.

The remaining affidavits offered in support of defendant's motion are hardly less authoritative or incisive in analyzing the incorrectness of the prior decision and in discussing the correct chemical terminology. As a result, I am persuaded that the monoamines set out in item 425.20 can only be those compounds in which the amino group is not superseded by a function of higher priority as such functions are determined in accordance with the prevailing standards of chemical nomenclature.

The affidavits offered by plaintiff were not without their measure of authority or persuasion but in the balance they did not persuade me that the naming of the importation as a monoamine was correct.

---

[4] See generally, Tariff Classification Study, Schedule 4, page 2

For the resasons set out above and because it is undisputed that the importation is an organic nitrogenous compound, it is hereby

ORDERED, that plaintiff's motion for judgment on the pleadings be, and the same hereby is, denied, and it is further

ORDERED, that defendant's motion for summary judgment be, and the same hereby is, granted, and it is further

ORDERED, ADJUDGED and DECREED, that the classification of the merchandise at bar by the appropriate customs officer, under item 425.52 of the TSUS, as modified by T.D. 68–9, be, and the same hereby is, sustained, and it is further

ORDERED, ADJUDGED and DECREED, that all claims by plaintiff be, and the same hereby are, overruled and dismissed with prejudice.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *February 2, 1976.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/19	Boe, C. J. January 28, 1976	Fedtro, Inc.	68/29460	Item 684.70 15%	Item 685.20 10%	Agreed statement of facts	New York Earphones chiefly used as parts of television apparatus

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/20	Watson, J. January 28, 1976	Joseph Markovits, Inc.	67/53237	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Artificial flowers, etc., in c.v. of plastics
P76/21	Maletz, J. January 28, 1976	Max Gray et al.	66/2091, etc.	Item 737.15 35% Item 737.90 35%, 28% or 21%	Item 657.20 19% or 15% (items marked "B") Item 657.35 1.275¢ per lb. +15%; 1¢ per lb. +12%; 0.7¢ per lb. +9% (items marked "C")	Pacific Fast Mail v. U.S. (C.D. 4333) (items marked "B" and "C")	San Francisco Parts of model railroad equipment designed chiefly for adult hobbyists and made to specifications of National Model Railroad Association; in c.v. of iron or steel (items marked "B"); in c.v. of brass (items marked "C")
P76/22	Newman, J. January 28, 1976	Libbey-Owens Ford Glass Co.	70/47154	Item 531.39 15%	Item 531.27 3%	Pittsburgh Plate Glass Company v. U.S. (C.D. 4553)	San Francisco Refractory bricks and blocks

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decision

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/11	Re, J. January 28, 1976	Patrick & Graves	R60/8846, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Houston Japanese plywood

Appeals to United States Court of Customs and Patent Appeals

APPEAL 76–6.—United States *v.* Texas Instruments Incorporated.—TRANSISTORS—U.S. FABRICATED COMPONENTS (SILICON CHIPS; SLICES)—ALLOWANCE UNDER ITEM 807.00 TSUS—SUMMARY JUDGMENT. Appeal from judgment of November 26, 1975 (Abs. P75/653).

In this case merchandise (MPC 3904 Silect Transistors and TIC 44 Power Transistors) was assessed at 6 percent ad valorem under item 687.60, Tariff Schedules of the United States, as transistors, without an allowance under item 807.00. Plaintiff-appellee moved for summary judgment claiming that the cost or value of the United States fabricated components—silicon chips—should have been deducted from the appraised values of the imported transistors in accordance with item 807.00. Defendant-appellant cross-moved for summary judgment contending the silicon chips are not fabricated components, the product of the United States—"the silicon slices which contain the circuits which eventually become the chips, are the fabricated components, the product of the United States. * * * The silicon slice, when exported, is not in a condition ready for assembly without further fabrication. The scribing step is a further fabrication step and not an operation incidental to assembly." The Customs Court granted plaintiff's motion for summary judgment and denied defendant's cross-motion.

It is claimed that the Customs Court erred in granting plaintiff's motion for summary judgment; in denying defendant's cross-motion for summary judgment; in finding and holding that the imported transistors are properly classifiable under item 807.00, TSUS, with the cost or value of the silicon chips being deducted from the appraised values of the transistors; in not finding and holding that scribing of the silicon slices was not an operation incidental to assembly; in not finding and holding that scribing of the silicon slices was a further fabrication step; in not finding and holding that the silicon chips were not exported in condition ready for assembly without further fabrication; in not finding and holding that the silicon chips were not fabricated components, the product of the United States; and in not finding and holding that the silicon slices were the fabricated components, the product of the United States.

APPEAL 76–7.—Intercontinental Fibres, Inc. *v.* United States.—YARN, "PRODUCER'S TWIST"—YARNS OF MAN-MADE FIBERS—GROUPED FILAMENTS—TSUS. Appeal from C.D. 4617.

In this case yarn, whose filaments possess a degree of twist known as producer's twist, present in an amount of approximately 0.4 turns per inch, was held properly dutiable as assessed at 20 cents per pound under the provision in item 310.01, Tariff Schedules of the United States, as modified by T.D. 68–9, for yarns of man-made fibers with twist of not over 20 turns per inch. Plaintiff-appellant claimed that the merchandise was dutiable at 16.5 percent ad valorem under the provision in item 309.31, as modified, for grouped filaments.

It is claimed that the Customs Court erred in finding and holding that the plaintiff failed to sustain its claim under item 309.31, *supra;* in not finding and holding that the Government's classification under item 310.01, *supra,* was erroneous; in not finding and holding that the subject yarn consists of filaments which are substantially parallel; in finding and holding that the statutory term "substantially parallel" means virtually parallel; in finding and holding that the subject merchandise is "twisted"; and in not finding and holding that twist in producer's twist yarn is "unintentional."

Index

U.S. Customs Service

Court of Customs and Patent Appeals

Customs Court

U.S. GOVERNMENT PRINTING OFFICE: 1976